

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

DONNIE RAY MCKINLEY JR., } Case No.: EDCV 17-01023-VBF (JDE)  
Petitioner, }  
v. } ORDER TO SHOW CAUSE  
RAYMOND MADDEN, Warden, }  
Respondent. }

On May 23, 2017, Petitioner Donnie Ray McKinley Jr. (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition” or “Pet.”). The Petition appears to be directed to a 1996 conviction sustained by Petitioner in the Riverside County Superior Court. Petitioner raises a single ground for relief, alleging that his equal protection rights have been violated. (Pet. at 10.)

Based on its review of the Petition, as well as information derived from the docket of the United States District Court, Central District of California, it appears to the Court that the Petition herein constitutes a second or successive petition under 28 U.S.C. § 2244(b), as Petitioner previously sought habeas relief from the same 1996 judgment of conviction.

1        The Antiterrorism and Effective Death Penalty Act of 1996 (the  
2        “AEDPA”) applies to the instant action because Petitioner filed it after the  
3        AEDPA’s effective date of April 24, 1996. See Campbell v. Henry, 614 F.3d  
4        1056, 1058 (9th Cir. 2010). The AEDPA “greatly restricts the power of federal  
5        courts to award relief to state prisoners who file second or successive habeas  
6        corpus applications.” Tyler v. Cain, 533 U.S. 656, 661 (2001). Title 28, United  
7        States Code, Section 2244(b) provides, in pertinent part, as follows:

8                (1) A claim presented in a second or successive habeas  
9        corpus application under section 2254 that was presented in a prior  
10       application shall be dismissed.

11                (2) A claim presented in a second or successive habeas  
12        corpus application under section 2254 that was not presented in a  
13       prior application shall be dismissed unless –

14                        (A) the applicant shows that the claim relies on a new  
15        rule of constitutional law, made retroactive to cases on  
16        collateral review by the Supreme Court, that was previously  
17       unavailable; or

18                        (B)(i) the factual predicate for the claim could not have  
19        been discovered previously through the exercise of due  
20       diligence; and

21                        (ii) the facts underlying the claim, if proven and  
22        viewed in light of the evidence as a whole, would be  
23        sufficient to establish by clear and convincing evidence that,  
24        but for constitutional error, no reasonable factfinder would  
25        have found the applicant guilty of the underlying offense.

26                (3)(A) Before a second or successive application permitted  
27        by this section is filed in the district court, the applicant shall move  
28        in the appropriate court of appeals for an order authorizing the

1 district court to consider the application.

2 A petitioner's failure to obtain authorization from the appropriate  
3 appellate court before filing a second or successive habeas petition deprives the  
4 district court of jurisdiction to consider the petition. See Burton v. Stewart, 549  
5 U.S. 147, 157 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001)  
6 (per curiam).

7 Here, Petitioner previously challenged his 1996 conviction in at least  
8 three habeas petitions in the Central District of California: (1) Donnie Ray  
9 McKinley v. Larry E. Scribner, 5:07-cv-00987-VBF-OP ("First Action"); (2)  
10 Donnie Ray McKinley v. Larry Small, 5:10-cv-00845-VBF-OP ("Second  
11 Action"); and (3) Donnie Ray McKinley v. R T C Grounds, 5:13-cv-00879-  
12 VBF-OP ("Third Action"). The First Action was dismissed with prejudice as  
13 time-barred on November 1, 2007. (First Action, Dkt. No. 8.) Petitioner filed  
14 an appeal, but his requests for a certificate of appealability were denied by the  
15 district court and the Ninth Circuit. (Id., Dkt. Nos. 15, 18.) The Second Action  
16 was dismissed with prejudice as untimely and for failure to state a claim for  
17 federal habeas relief. (Second Action, Dkt. Nos. 16-17.) The Third Action was  
18 dismissed without prejudice for lack of subject matter jurisdiction. (Third  
19 Action, Dkt. Nos. 4-5.) Although Petition claims in instant Petition that he is  
20 not "attack[ing] a conviction or a sentence" (Pet. at 2), a review of the  
21 supporting memorandum demonstrates otherwise. The allegations of the  
22 Petition reflect that Petitioner is, in fact, challenging the same 1996 conviction  
23 at issue in his previous habeas petitions, including the California Court of  
24 Appeal's 1998 decision on direct appeal. (See, e.g., id. at 12 ("Petitioner [was]  
25 unfairly prejudiced by appellate court's opinion deciding Petitioner was more  
26 culpable than defendant in People v. Dillion (1983) 34 Cal. 3d 441"), 13  
27 (alleging that felony murder unfairly prejudices youthful aid and abettors"), 20  
28 (alleging that "his sentence is wholly unfair").) As explained, however,

1 Petitioner's First and Second Actions were dismissed with prejudice as  
2 untimely. Because a dismissal of a habeas petition for untimeliness "presents a  
3 'permanent and incurable' bar to federal review of the underlying claims,"  
4 "dismissal of a section 2254 habeas petition for failure to comply with the  
5 statute of limitations renders subsequent petitions second or successive for  
6 purposes of the AEDPA." McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir.  
7 2009). Thus, the Petition now pending constitutes a second and/or successive  
8 petition and as such, Petitioner must obtain permission from the Ninth Circuit  
9 before this Court can adjudicate any challenge to his 1996 conviction. Nothing  
10 in the record demonstrates that Petitioner has obtained the requisite  
11 authorization from the Ninth Circuit and Petitioner does not claim that he  
12 sought or received such authorization. Indeed, it appears that Petitioner  
13 currently has an application for permission to file a second or successive  
14 habeas petition pending before the Ninth Circuit Court of Appeals, seeking to  
15 challenge the 1996 conviction on different grounds. See Donnie v. McKinley v.  
16 Raymond Madden, Case No. 17-70902. Therefore, it appears that the Court  
17 lacks jurisdiction to adjudicate Petitioner's challenge to his 1996 conviction.

18 IT THEREFORE IS ORDERED that **on or before July 10, 2017**,  
19 Petitioner show cause in writing why the Court should not dismiss this action  
20 with prejudice because Petitioner failed to secure an order from the Ninth  
21 Circuit authorizing the District Court to consider the Petition, prior to filing it  
22 in this Court.

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1 Petitioner is expressly warned that his failure to timely respond to this  
2 Order may result in the Petition being dismissed for the reasons stated  
3 above and for failure to prosecute.

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5 Dated: June 9, 2017

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7 JOHN D. EARLY  
8 United States Magistrate Judge  
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